IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

LESLIE GRUSSING, Plaintiff, vs. ORTHOPEDIC AND SPORTS MEDICINE, INC. a Missouri Corporation and COREY SOLMAN, JR., M.D., Defendants.	)))))))))))	Cause No. 4:15-cv-01333-CAS

SUGGESTIONS IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW AT THE CLOSE OF PLAINTIFF'S CASE

Come now defendants, Orthopedic and Sports Medicine, Inc. and Corey Solman, Jr., M.D., and respectfully submit their Suggestions in Support of their Motion for Judgment as a Matter of Law, pursuant to Rule 50 of the Federal Rules of Civil Procedure.

I. Introduction

Plaintiff has failed to make a submissible case against defendants for medical malpractice under Missouri law. Accordingly, she has not met her burden of proof at trial and defendants should be granted Judgment as a matter of law.

Judgment as a matter of law is appropriate "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1) (2010). Where the facts are sufficiently clear that the law requires judgment in favor of the defendant, the trial court may remove the claim from the jury's consideration. *Weisgram v. Marley Co.*, 528 U.S. 440, 447-48 (2000).

II. Argument

In medical negligence claims, federal courts apply the legal standards set forth in Missouri case law. *Dugger v. United States*, 936 F. Supp. 662, 664 (E.D.Mo 1996). Three elements must be established to make a prima facie case of medical malpractice: (1) an act or omission of the defendant that failed to meet the requisite standard of care; (2) the act or omission was negligently performed; and (3) the act or omission caused the plaintiff' s injury. *Mueller v. Bauer*, 54 S.W.3d 652, 656 (Mo. App. E.D. 2001).

Standard of Care

Generally, in a medical malpractice case, a plaintiff must introduce expert testimony to prove that the defendant failed to exercise the degree of skill and care ordinarily used under same or similar circumstances by members of his or her profession. *Boehm v. Pernoud,* 24 S.W.3d 759, 761 (Mo. App. E.D. 2000).

An expert who testifies solely in terms of "standards of care," without reference to MAI 11.06 or comparable language, does not satisfactorily articulate the appropriate legal standard. *McLaughlin v. Griffith*, 220 S.W.3d 319, 321 (Mo. App. S.D. 2007) (*citing* Ladish v. Gordon, 879 S.W.2d 623 (Mo. App. W.D. 1994)). Every medical negligence expert should be properly oriented with the established legal standard. *Id*. Although the standard need not be recited in ritualistic fashion, the expert's testimony in context should prove that the proper legal standard was used. *Id.* It is not enough that MAI 11.06 instructs the jury what negligence means; jurors must know an expert's opinion is based on MAI 11.06 and not something else. *Id.* If attorneys and expert witnesses are allowed to become sloppy in the use of terms such as "accepted standards" and "standards of care" without specifying at some point in the witness' testimony the meaning of those terms, experts will inevitably tend to rely upon their own views of acceptable practice rather than applying the objective legal standard. *Id*.

This issue is not whether plaintiff's counsel followed precisely the formulated words of MAI instruction 11.06; however the issue is whether the substance of the expert's answers to questioning provided the jury with an explanation of the standard of care. *See Hickman v. Branson Ear, Nose & Throat, Inc*., 256 S.W.3d 120 (Mo. banc. 2008).

In the present case, plaintiff's sole expert witness, Dr. Bal, testified to one alleged deviation from the standard of care; namely, he testified that Dr. Solman was negligent by failing to test the fluid aspirated on July 18, 2014 for cell count, culture and sensitivity.

Causation

Additionally, plaintiff must allege and offer facts that would support finding a causal connection between the defendant's actions and the patient's injury. Id. To establish causation in fact, the plaintiff must show that her injury would not have occurred but for the defendant's negligence. *Nadolski v. Ahmed*, 142 S.W.3d 755, 761 (Mo. App. 2004). When an expert merely testifies that a given action or failure to act 'might' or 'could have' yielded a given result, though other causes are possible, such testimony is devoid of evidentiary value." *Baker v. Guzon*, 950 S.W.2d 635, 646 (Mo.App.1997). Further, where an expert's testimony is mere conjecture and speculation, it does not constitute substantive, probative evidence on which a jury could find ultimate facts and liability. *Gaddy v. Skelly Oil Co.*, 364 Mo. 143, 259 S.W.2d 844, 853 (1953).

In the present case, Dr. Bal testified that Dr. Solman caused or contributed to cause damage to the plaintiff. However, Dr. Bal did not testify as to a causal connection between the damages claimed and the sole alleged deviation from the standard of care. The lack of expert testimony drawing a causative link between the sole basis of alleged negligence and the damages is fatal to the submission of plaintiff's case against defendants.

III. Conclusion

For all of the forgoing reasons, plaintiff has failed to make a submissible case of medical malpractice under Missouri state law. Accordingly, plaintiff's claim should not be submitted to the jury for consideration and this Court should enter Judgment as a matter of law in favor of defendants on plaintiff's Complaint.

/s/David P. Ellington

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system on this 2nd day of February, 2017 to: Mr. Todd N. Hendrickson, Law Offices of Todd N. Hendrickson, 911 Washington Avenue, Suite 400, St. Louis, MO 63101 ***(Attorney for Plaintiff).***

/s/David P. Ellington

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